

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1776 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
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ONGC LTD.

Versus

SALES OFFICER 1

Appearance:

MR KH KAJI for Petitioner

M/S MG DOSHIT & CO for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 06/05/99

ORAL JUDGEMENT

#. Rule. Service of Rule is waived by Mr. M.G.Doshit, learned counsel for the respondents. Heard at the request of parties.

#. The petitioner challenges two notices issued by the respondent No.1 Sales Tax Officer one on 17.12.98 asking the petitioner to pay a sum of Rs.2,92,47,252/purported to be as interest payable by the assessee, under Section 47 of the Gujarat Sales Tax Act 1969 and another notice of demand dated 15.2.99 asking the petitioner to pay like sum by way of penalty under Sections 45 or 46 of the said Act. The petitioner alleges that neither assessment has been made sofar which can provide foundation for any demand either by way of interest or by way of penalty nor any hearing was given before raising this demand. He further contends that in fact revised declaration was made under Section 40(3) by mistake and accordingly tax as per such revised declaration had tax has been paid by the assessee under a mistake and he is entitled to claim refund which he would put forward during the course of assessment proceedings.

#. Learned counsel for the revenue conceded to the extent the grievance of the petitioner is related to the demand of penalty admitting the fact that no assessment order has been made sofar, and that until liability of the assessee to pay tax is determined, or any order levying penalty under Section 45 or 6 of the Act is made in appropriate proceedings, no demand asking the assessee to make any amount by way of penalty could have been raised. He therefore candidly states that notice dated 15.2.1999 raising a demand of Rs.2,92,47,252/- by way of penalty under Section 45/46 of the Act is premature.

#. However, he contends that under Section 47(4A) of the Gujarat Sales Tax Act, the liability to pay interest on delayed payment of tax is automatic, therefore demand raised by notice dated 17.12.1998 for payment of interest is valid one. However, he does not dispute that ultimate liability of interest can only relate to the ultimate assessment of tax in regular assessment proceedings. He relies on subsection (4A) of Section 47 of the Gujarat Sales Tax Act, 1969:

Section 47 reads as under:

"47. Payment of tax and deferred payment of tax
etc.

- (1) Tax shall be paid in the manner herein provided, and at such intervals as may be prescribed.
- (2) A registered dealer furnishing declarations or returns as required by subsection (1) of section 40, shall first pay into a Government

treasury, in the manner prescribed the whole amount of tax due from him according to such declaration or return along with the amount of any penalty payable by him under Section 45.

(3) A Registered dealer furnishing a revised declaration or revised return in accordance with subsection (3) of Section 40 which revised declaration or revised return shows that a larger amount of tax than already paid is payable, shall fir pay into a Government Treasury the extra amount of tax.

(4)(a) The amount of tax -

- (i) due where declarations or returns have been furnished without full payment therefor, or
- (ii) assessed or reassessed for any period under section 41 or section 44 less any sum already paid by the dealer in respect of such period, or assessed under Section 50,
- (b) the amount of penalty (if any) levied under Section 45 or 46, and
- (c) the amount of interest, if any, under subsection (4A)

shall be paid by the dealer or the person liable therefor into a Government treasury by such date as may be specified in a notice issued by the commissioner for this purpose, being a date not earlier than (ten days) from the date of service of the notice:

Provided that the Commissioner or an appellate authority in an appeal under section 65 may, in respect of any particular dealer or person, and for reasons to be recorded in writing, extend the date of payment, or allow him to pay the tax or penalty (if any) by instalments.

Provided further that notwithstanding anything contained in this Act or in the rules made thereunder but subject to such conditions as the State Government or the Commissioner may, by general or special order specify, where a dealer to whom incentives by way of deferment of sales tax or purchase tax or both have been granted by virtue of Eligibility Certificate granted by the Commissioner of Industries, Gujarat State or any authorised by him in this behalf and where a loan liability equal to the amount of any such tax payable by such dealer has been raised by the Gujarat Industrial Investment Corporation Limited or the Gujarat State Financial Corporation Limited, then such tax shall be deemed, in the public interest, to have been paid

(4-A)(a) Where a dealer does not pay the amount

of tax within the time prescribed for its payment under subsection (1), (2) or (3), then there shall be paid by such dealer for the period commencing on the date of expiry of the aforesaid prescribed time and ending on date of payment of the amount of tax, simple interest, at the rate of twenty four per cent, per annum on the amount of tax not so paid or any less amount thereof remaining unpaid during such period.

- (b) Where the amount of tax assessed or reassessed for any period under Section 41 or section 44, subject to revision if any under Section 67, exceeds the amount of tax already paid by a dealer for that period, there shall be paid by such dealer, for the period commencing from the date of expiry of the time prescribed for payment of tax under subsection (1), (2) or (3) and ending on date of order of assessment, reassessment or, as the case may be, revision, simple interest at the rate of twenty four per cent per annum on the amount of tax not so paid or any less amount thereof remaining unpaid during such period.
- (c) Where a dealer does not pay the amount of tax falling under clause (a) of subsection (4) on or before the date specified in the notice issued under that subsection, then there shall be paid by such dealer for the period commencing on the specified date and ending on the date of payment, simple interest at the rate of twenty four per cent per annum on the amount of tax not so paid or any less amount thereof remaining unpaid during such period:

Provided that no interest shall be payable under clause (b),

- (i) in the case where dealer has furnished the returns or declaration and make payment of the amount of tax in accordance with the provisions of subsection (1), (2) or (3) and the difference between the amount of tax assessed or reassessed for any period and the amount of tax so paid for such period does not exceed ten per cent of the amount of tax so paid by the dealer;
- (ii) xxxx
- (iii) in the case where any assessment is kept pending in accordance with a general or special order of the State Government or the Commissioner, in respect of the period for which the assessment is kept pending;
- (iv) in the case where on account of an order passed under Section 67 an additional amount of

tax becomes payable by a dealer on such additional amount of tax for the period commencing on the date of order of assessment and ending on the date of the order so passed.

- (v) In the case where on account of a judgment of the Gujarat High Court or the Supreme Court an additional amount of tax becomes payable by a dealer, on such additional amount of tax for the period ending on the date of such judgment.
- (vi) in the case where in assessing the amount of tax from any dealer under this Act in respect of any period, the time taken for making an order of assessment exceeds thirty six months from the date of expiry of the time prescribed for payment of tax under subsection 47, in respect of the period exceeding thirty-six months
- (4B) Where a dealer is liable to pay interest under section (4A) and he makes payment of an amount which is less than the aggregate of the amount of tax, penalty and interest, the amount so paid shall be first applied towards the amount of interest, thereafter the balance, if any, towards the amount of penalty and thereafter the balance, if any, towards the amount of tax.
- (5) Any tax, penalty or interest which remains unpaid after the date specified in the notice for payment, or after the extended date of payment, and any instalment not duly paid, shall be recoverable as an arrear of land revenue.
- (6) This section as amended by Section 5 of the Gujarat Sales Tax (Amendment) Ordinance, 1991 shall apply and shall be deemed always to have applied in relation to the liability to pay tax on sales of goods, specified sales and purchases of goods which have taken place during the period commencing the 1st April, 1990 and ending immediately before the commencement of the said section."

#. Subsection (1) of Section 47 requires tax shall be paid in the manner provided, under the following provisions of Section and at such intervals as may be prescribed. Rule 25 provides the intervals at which tax is to be paid. Subsection (2) of Section 47 requires that a registered dealer furnishing declarations or returns as required by subsection (1) of section 40, shall first pay into a Government treasury, in the manner prescribed the whole amount of tax due from him according to such declaration or return. Section 40 mandates that every registered dealer shall furnish declarations or return for such period by such dates and to such

authority as may be prescribed. It is not in dispute that the petitioner did file periodical returns under subsection (2) as required under Section 40 and has paid tax in time as per the declaration contained in those returns.

#. Subsection (3) of Section 47 further provides that a registered dealer furnishing a revised declaration or revised return in accordance with subsection (3) of Section 40, where revised declaration or revised return shows that a larger amount of tax than already paid is payable, shall first pay into a Government Treasury the extra amount of tax.

#. The petitioner in the month of October received additional sum of Rs.185 crores from oil pool account. On receipt of such additional sum the assessee filed a revised return by including the said sum in its taxable turnover and additional amount of tax payable as a result of inclusion of this additional sum was also paid within the time allowed under subsection (3) of Section 47.

#. The above facts are not in dispute. Thus according to the undisputed position, the assessee had paid tax in accordance with subsection (1), (2) and (3) of Section 47 as per his declaration respectively original as well as revised. Assessment has yet to come into existence determining the exact liability of tax to which the assessee can be subjected to. The claim of the assessee that revised return has been submitted by including the additional sum received by it from oil pool account as part of taxable turnover by mistake and he is entitled to refund has yet to be determined.

#. Subsection (4A) of Section 47 provides for charging of interest for delayed payment of tax and under which only the notice of demand dated 17.12.1998 is sought to be justified. Subclause (a) of Subsection (4A) clearly postulates that where a dealer does not pay the amount of tax within the time prescribed for its payment under subsection (1), (2) or (3), then there shall be paid by such dealer for the period commencing on the date of expiry of the aforesaid prescribed time and ending on date of payment of the amount of tax, simple interest, at the rate of twenty four per cent, per annum on the amount of tax not so paid. It has been noticed above undisputedly assessee has paid tax as per declarations made by him under subsection (1), (2) and (3) of Section 47. No liability to pay interest on the additional sum of tax required to be paid under Subsection (3) of Section 47 is envisaged at that stage under Section

47(4A).

##. Clause (b) provides where the amount of tax assessed or reassessed for any period under Section 41 or section 44, subject to revision if any under Section 67, exceeds the amount of tax already paid by a dealer for that period, there shall be paid by such dealer, for the period commencing from the date of expiry of the time prescribed for payment of tax under subsection (1), (2) or (3) and ending on date of order of assessment, reassessment or, as the case may be, revision, simple interest at the rate of twenty four per cent per annum on the amount of tax not so paid or any less amount thereof remaining unpaid during such period. Obviously subclause (b) has no role to play in the present case inasmuch as it comes into operation after the amount of tax has been assessed or reassessed, and no assessment having taken place subclause (b) cannot operate.

##. Subclause (c) of subsection (4-A) envisage yet another circumstance in which a dealer is liable to pay interest. Where a dealer does not pay the amount of tax falling under clause (a) of subsection (4) on or before the date specified in the notice issued under that subsection, then there shall be paid by such dealer for the period commencing on the specified date and ending on the date of payment, simple interest at the rate of twenty four per cent per annum on the amount of tax not so paid or any less amount thereof remaining unpaid during such period.

##. Obviously, this clause also cannot be brought in aid by the respondent inasmuch as no demand notice dated 17.12.98 is not founded on any previous demand of tax raised by the competent officer which has remained unpaid. Liability to pay interest for delayed payment in pursuance of demand notice under Section 4 postulates a previous demand by the concerned authority and that remaining to be complied. Nor it is a case of the respondent that any notice of demand under Section 47(A) was issued and the assessee has not paid the said demand within the time allowed under Section 47(9).

##. The first proviso to Section 47(4A) clearly makes out that where the assessee has furnished the returns or declaration and make payment of the amount of tax in accordance with the provisions of subsection (1), (2) or (3) if the difference between the amount of tax assessed or reassessed for any period and the amount of tax so paid for such period does not exceed ten per cent of the amount of tax so paid by the dealer, no interest shall be

payable under clause (b). This proviso leaves no room of doubt that where a tax has been paid by the registered dealer in accordance with the declarations made by him whether under subsection (1) of Section 40 or as per the revised return under subsection (3) of Section 40, the liability of payment of interest could not arise except after framing of assessment and on finding that difference if any, between the tax assessed and tax paid is mere ten per cent.

#. We are therefore not impressed by the contention of the learned counsel for the respondent that the Sales Tax Officer was justified in raising the demand of interest before making assessment and finding whether the assessed tax is more than prescribed limit from the tax paid as per the declaration submitted by the assessee which were admittedly submitted in time and tax computed on that basis has been paid within time.

##. We are also not impressed by the contention of the learned counsel for the respondent that no enquiry was necessary so as to require an opportunity of hearing being given to the assessee before computing the amount of interest on the alleged delayed payment of tax.

##. This case demonstrates the fallacy of the contention firstly, the assessee is entitled to show that in fact there is no delay in payment before he is asked to pay interest, secondly, he is also entitled to show, and which right learned counsel for the respondent does not dispute, that in fact the assessee has no additional tax liability which he was liable to pay and he is in fact entitled to a refund. That is the question that is to be determined only after affording an opportunity to the assessee by the assessing officer during the course of assessment.

##. Duty to act fairly is inherent in every State action. We have not been shown any provision of law which authorises the Sales Tax Officer to straight way issue notice without determining and without disclosing existence of necessary facts which brings operation of subsection (4A) to take shelter behind the spacious plea that levy of interest is automatic. The levy of interest can be automatic only after founding necessary facts which establish that the liability to pay interest under Section 47(4A) has arisen and determining the amount so payable by way of interest on a specified sum that is held to be delayed payment of tax, with reference to which the liability of any assessee to pay interest is to be computed. No demand of interest can be raised in

vacuum. But before liability of tax has been established there cannot be a starting point of automatic levy of interest.

##. We therefore find that the notice dated 17.12.98 suffers from apparent arbitrariness and is contrary to law.

Petition therefore succeeds. Impugned Notices dated 17.12.98 and 15.2.99 are quashed.

There shall be no order as to costs.

(Rajesh Balia, J) (A.R. Dave, J)